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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**

11 DOMINIQUE OSBORNE, on her own
12 behalf on behalf of a class of similarly
13 situated persons pursuant to F.R.C.P.
14 23 and U.S.C. 216, and on behalf of
15 the General Public,

16 Plaintiffs,

17 v.

18 THE PRUDENTIAL INSURANCE
19 COMPANY OF AMERICA, a New
20 Jersey Corporation,

21 Defendant.

Case No. CV10-2465 JFW (CWx)

The Hon. John F. Walter

**[PROPOSED] STATEMENT OF
DECISION ON BEHALF OF
DEFENDANT PRUDENTIAL
INSURANCE COMPANY OF
AMERICA, INC.**

Date: December 6, 2010
Time: 1:30 p.m.
Courtroom: 16

Complaint Filed: April 5, 2010
Discovery Cutoff: March 1, 2011
Motion Cutoff: March 28, 2011
Pre-Trial Conf.: May 6, 2011
Trial Date: May 24, 2011

1 This matter came on for hearing on December 6, 2010, the Honorable John
 2 F. Walter, United States District Judge presiding, on a Motion for Summary
 3 Judgment filed by Defendant The Prudential Insurance Company of America, Inc.
 4 (“Prudential” or “Defendant”) as to the Complaint filed on behalf of Plaintiff
 5 Dominique Osborne (“Plaintiff”).

6 Plaintiff appeared and argued through her counsel of record, Grant G. Teeple
 7 and Jason N. Black of the law firm of Teeple Hall LLP. Defendant appeared and
 8 argued through its counsel of record, Jon D. Meer and Simon Yang of the law firm
 9 of Seyfarth Shaw LLP. Thereafter, with the pleadings and evidence presented
 10 having been fully considered, the issues having been duly heard and a decision
 11 having been duly rendered,

12 IT IS HEREBY ORDERED AND ADJUDGED that Defendant’s Motion for
 13 Summary Judgment is GRANTED in its entirety as follows:

14 Plaintiff worked for Prudential from August 21, 2008 to July 17, 2009.
 15 (SUF ¶ 1.) Plaintiff was assigned to the company’s client service center or call
 16 center in Agoura Hills, California. (SUF ¶ 2.) Following her termination, Plaintiff
 17 filed a Complaint against Prudential for violation of the Fair Labor Standards Act
 18 (“FLSA”), 29 U.S.C. § 201 *et seq.*

19 Plaintiff’s Complaint contains only one cause of action for “unpaid overtime
 20 Compensation.” (Complaint, ¶¶ 46-52.) Plaintiff alleges that Prudential failed to
 21 pay overtime wages throughout her employment in violation of the FLSA, 29
 22 U.S.C. § 207(a)(1). (Complaint, ¶ 50.) However, Plaintiff admitted in her
 23 deposition that she **never** worked overtime. (SUF ¶ 18.) More specifically,
 24 Plaintiff never worked over 40 hours in any week while she was employed at
 25 Prudential. (SUF ¶ 18.)

26 The FLSA mandates that employers pay overtime premium pay **only** when
 27 an employee works in excess of 40 hours in one workweek. *See* 29 U.S.C.
 28 § 207(a)(1) (“[N]o employer shall employ any of its employees . . . for a workweek

1 longer than forty hours unless such employee receives compensation for his
 2 employment in excess of the hours above specified at a rate not less than one and
 3 one-half times the regular rate at which he is employed”); *Smith v. T-Mobile USA,*
 4 *Inc.*, 570 F.3d 1119, 1120 n.1 (9th Cir. 2009) (“The FLSA states, in relevant part,
 5 that ‘no employer shall employ any of his employees . . . for a workweek longer
 6 than forty hours unless such employee receives compensation for his employment
 7 in excess of the hours above specified at a rate not less than one and one-half times
 8 the regular rate at which he is employed.’”) (citing 29 U.S.C. § 207(a)(1)).
 9 Because it is undisputed that Plaintiff never worked over 40 hours in any week, she
 10 has no viable claim for violation of the overtime provisions of the FLSA, 29
 11 U.S.C. § 207(a)(1), as a matter of law.

12 Plaintiff also asserts that she was not paid “for all of the hours [she]
 13 worked.” (Complaint, ¶¶ 25, 28, 29.) Despite these factual recitations, Plaintiff
 14 did not plead any cause of action for non-overtime wages. Thus, she has failed to
 15 preserve any right to allege such a claim.

16 But even if Plaintiff’s allegations of other extra “hours worked” are
 17 considered, these allegations do not state any violation of the FLSA that could
 18 allow any recovery of damages. The FLSA allows recovery **only** for violation of
 19 its overtime pay requirements, 29 U.S.C. § 207(a)(1), or its minimum wage
 20 requirements, 29 U.S.C. § 206(a)(1). If the hours claimed to be worked do not
 21 exceed the FLSA’s overtime pay requirements under 29 U.S.C. § 207(a)(1), then
 22 the issue becomes whether the claimed hours worked meet the FLSA’s minimum
 23 wage requirements under 29 U.S.C. § 206(a)(1).

24 The minimum wage requirements of the FLSA merely require payment of
 25 the federal minimum wage based on the number of hours worked. Compliance
 26 with the minimum wage requirement is measured by an averaging method -- that
 27 is, “no violation occurs so long as the total weekly wage paid by an employer ...
 28 [is] equal to the number of hours actually worked that week multiplied by the

1 minimum hourly [rate].” *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d
 2 353, 357 (8th Cir. 1986) (internal quotation omitted). *Accord Maciel v. City of Los*
 3 *Angeles*, 542 F. Supp. 2d 1082, 1097 (C.D. Cal. 2008) (following *Hensley*).

4 Here, Plaintiff was paid \$730.50 per week. (SUF ¶ 62.) In order for
 5 Plaintiff’s weekly pay of \$730.50 to be less than the federal minimum wage of
 6 \$6.55 per hour, Plaintiff would have to work more than 111.5 hours per week. For
 7 Plaintiff to work 111.52 hours in a five-day week, she would have to work 22.3
 8 hours per day. Plaintiff, of course, does not claim to have worked such hours.

9 Because it is undisputed that Plaintiff earned in excess of the minimum
 10 wage for all hours worked -- including all of the alleged extra time worked outside
 11 her scheduled shift -- she cannot show a violation of the FLSA, as a matter of law.
 12 *See Adair v. City of Kirkland*, 185 F.3d 1055, 1062 (9th Cir. 1999) (affirming the
 13 denial of an FLSA claim for unpaid wages where the plaintiff earned above the
 14 minimum wage; “The district court properly rejected any minimum wage claim . . .
 15 finding that [the plaintiffs’] salary, when averaged across their total time worked,
 16 still paid them above minimum wage.”); *Maciel v. City of Los Angeles*, 542 F.
 17 Supp. 2d 1082, 1097-1098 (C.D. Cal. 2008) (“The FLSA creates a cause of action
 18 wherever a qualified employer fails to compensate for overtime. “Gap time” refers
 19 to time that is not covered by the overtime provisions because the time exceeds the
 20 internal employer’s policy, but does not exceed the straight-time limits under the
 21 FLSA;” “No violation [of the FLSA’s] minimum wage requirements occurs so
 22 long as the total weekly wage paid by an employer meets the minimum weekly
 23 requirements of the statute, such minimum weekly requirement being equal to the
 24 number of hours actually worked that week multiplied by the minimum hourly
 25 statutory requirement.”).

26 Even if the alleged off the clock gap time was compensable under the FLSA,
 27 Plaintiff’s claim would still fail for another separate and independent reason -- she
 28 deliberately did not follow Prudential’s written policies requiring her to record all

1 extra time worked and deliberately did not otherwise inform Prudential that she
2 had worked off the clock without pay at any time during her employment.

3 Plaintiff knew that Prudential had written policies that governed how to
4 record extra time worked beyond a scheduled shift and that Prudential had a
5 specific policy regarding payroll and timekeeping. (SUF ¶ 26.) Prudential's
6 written policies regarding payroll and timekeeping explicitly provide for extra pay
7 for extra work. (SUF ¶ 59.)

8 Plaintiff admitted that Prudential's policy regarding payroll and timekeeping
9 was always available on the electronic intranet system on her computer, but she
10 never bothered to review the policy. (SUF ¶ 27.) Thus, Plaintiff intentionally
11 failed to learn how to record any alleged extra time worked beyond her shift,
12 despite the fact that she was aware that the relevant policies and practices were
13 accessible to her.

14 Plaintiff also failed to inform her supervisor or manager that she allegedly
15 worked extra hours. (SUF ¶ 29.) Plaintiff admitted that she knew she "should
16 have" been paid for her extra time, but did not request payment. (SUF ¶ 29.)

17 Plaintiff's deliberate failure to comply with Prudential's written and
18 published time recording policies and her deliberate failure to inform her
19 supervisor or manager about her alleged off the clock work defeat any claim for
20 unpaid wages under the FLSA. *See Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646
21 F.2d 413, 414 (9th Cir. 1981) ("An employer must have an opportunity to comply
22 with the provisions of the FLSA;" "where the acts of an employee prevent an
23 employer from acquiring knowledge here of alleged uncompensated [work] hours,
24 the employer cannot be said to have suffered or permitted the employee to work in
25 violation of [the FLSA].").

26 Finally, any alleged extra time worked by Plaintiff was *de minimis*. Based
27 on her testimony, Plaintiff's alleged extra time worked before or after her shift
28 varied day-to-day, but in general totaled less than 10 minutes. Uncompensated

1 work of approximately 10 minutes per day is most often considered *de minimis*
2 and, therefore, not compensable. *See, e.g., Rutti v. Lojack Corp.*, 896 F.3d 1046,
3 1057-58 (9th Cir. 2010) (“No rigid rule can be applied with mathematical
4 certainty. Nonetheless, most courts ‘have found daily periods of approximately 10
5 minutes *de minimis* even though otherwise compensable.’”).

6 In sum, there is no triable issue as to any claim for unpaid overtime, 29
7 U.S.C. § 207(a)(1), and no triable issue as to any unpaid work below the federal
8 minimum wage, 29 U.S.C. § 206(a)(1). As a result, summary judgment is
9 GRANTED. Defendant shall also recover its costs of suit.

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11 DATED: December _____, 2010

HONORABLE JOHN F. WALTER
United States District Judge
U.S. District Court
for the Central District of California